Supreme Court, U.S.
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NO. 92-43

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

Robert Zamudio,

Petitioner,

versus

Samuel K. Skinner, Secretary,
Department of Transportation,

Respondent.

PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER FOR WRIT OF CERTIORARI

R O B E R T Z A M U D I O

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Questions Presented

1. Whether a court's assumption of court lack of jurisdiction in a civil action, may deprive a party's "due process" rights, etc.?

2. Whether the right of relief in a claim of civil and/or Constitutional right deprivation is lost if a court rules the claim could have been asserted in a prior civil action dismissed under an Order/Judgment of dismissal WITHOUT PREJUDICE FOR WANT OF JURISDICTION, if so, may a court deprive a party's due process of using the Court's power of discovery, by the Court doing its own investigation, etc. ?

3. Would the principles of the Fifth Circuit's "transactional" test be an appropriate test to apply the doctrine of Res Judicata, where the

Doctrine of Res Judicata applies mainly to prior court decision not being relitigated and the Fifth Circuit's "transactional" test applies the doctrine of Res Judicata to any claim that could have been brought up in a prior case without making reference if there was a decision on claim in prior case to preclude relitigation in second civil action in order to apply a dismissal under the Doctrine of Res Judicata, etc. ?

4. Whether the Petitioner's second civil action, CA-6-90-0083, has rights under the Sixth Amendment to the U.S. Constitution, where second civil action stemmed directly from Petitioner's (defense complaints) of the prosecution of Petitioner for a crime of defrauding the government, where Petitioner's second civil action was final defense

against prosecution resulting in deprivation of Petitioner's property, if so, has the Court unfairly deprived the Petitioner of his "due process", where the Sixth · U.S. Constitutional Amendment, (Const. Amend.), constraint laid upon the Courts and essential to a fair trial, and so, to due process of law, that the Sixth Const. Amend. is made obligatory upon the Courts either by the Fifth Const. Amend. and/or the Fourteenth Const. Amend. due process clause to include the Petitioner's right to enjoy the right ... to be confronted with the witness against him; to have compulsory process for obtaining witness in his favor, which included the Petitioner's second civil action being treated without prejudice, or to allow Petitioner due process of using the Court's power of discovery?

5. Whether the court unfairly deprived the Petitioner of right under 42 USC §2000e-16(c) for relief in civil action filed with a Federal Court, where the court refused to accept Petitioner's right to file a civil action under 42 USC § 2000e-16(c), where the Petitioner in accordance with 42 USC § 2000e-16(c) waited more than the required 180 days from date Petitioner filed complaint with Respondent and date of filing of civil action without Petitioner receiving a decision on Petitioner's claim, etc.?

6. Whether the Court unfairly deprived the Petitioner of his "DUE PROCESS" under Rule 41 of the Federal Rule of Civil Procedure by the Court comparing second civil action, CA-6-90-0083, whose prior civil action had been dismissed under an Order/Judgment

WITHOUT PREJUDICE FOR WANT OF JURISDICTION, with a Court cited civil action whose prior civil action had been dismissed with prejudice, to justify Court's assumption in Petitioner's case that the same lack of Jurisdiction in prior civil action would hold true in second civil action and to justify second civil action dismissal under the Doctrine of Res Judicata with court cited civil action?

7. Whether the Court has unfairly deprived the Petitioner of his due process of law right under Rule 41 of the Federal Rule of Civil Procedure, by the Court assuming a lack of court jurisdiction in prior civil action would also hold true in second civil action to the point the Court did not afford the Petitioner the same Due Process other Courts allowed other

civil actions with similar cause of action as Petitioner's second civil?

8. Where a prior civil action was dismissed under an Order/Judgment WITHOUT PREJUDICE FOR WANT OF JURISDICTION, and questions of court jurisdiction arises in a second civil action with different claims than prior civil action would a court be in conflict and/or be a departure from the accepted and usual course of judicial proceedings if the Court treated second civil action with prejudice prior to issuing Court's final decision, if so, would a Court of Appeals that sanctioned lower Court's departure not be an example as to call for an exercise of this Court's power of supervision?

9. May a Court apply the principles of the Fifth Circuit's "transactional" test to estop the right of Petitioner

to procedural due process in issues such as court jurisdiction or claims of civil or Constitutional right deprivation and the Court not be in conflict or be a departure from the accepted and usual course of juridical proceedings, such as the cited Supreme Court decisions and/or Federal Rule• of Civil Procedure (Rule 41), etc.?

10. etc.- would the previous example(s) be a condition to warrant a call for an exercise of this Court's power of supervision, where the U.S. Court of Appeals for the Fifth Circuit sanctioned the departure of the U.S. District Court from the accepted and usual course of juridical proceedings and/or in conflict with the decision or actions of other Federal Courts, including prior Supreme Court decisions on the same matter?

LIST OF PARTIES TO PROCEEDING

The Petitioner certify that the following were parties to the proceedings:

The Petitioner - Robert Zamudio.

The Respondent is Mr. Samuel K. Skinner, Secretary, Department of Transportation, the United States of America and Mr. Skinner, Secretary, Department of Transportation is represented by Mrs. Nancy Koenig, Assistant U.S. Attorney for the Northern District of Texas, Lubbock, Texas; the Attorney General Mr. William Barr; solicitor General, Department of Justice; all Judges of the United States Court of Appeals of the Fifth Circuit that sat on the Court between the dates of March 17, 1992 and April 6, 1992.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO PROCEEDING	VII
TABLE OF AUTHORITIES	XI
CONSTITUTIONAL PROVISIONS INVOLVED	1
PRIOR DECISIONS OF THIS COURT INVOLVED	3
STATUE INVOLVED	4
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	4
OPINIONS AND ORDERS BELOW	4
JURISDICTION OF THE SUPREME COURT	5
STATMENT OF THE CASE	6
The District Court Decision	11
The Court of Appeals Decision	16
REASON FOR GRANTING THE WRIT	27

A Federal District Court has rendered a decision in conflict with the decision of other U.S. Courts on the same matter, that

the decision has so far departed from the accepted and usual course of judicial proceedings and the Fifth Circuit Court of Appeals has sanctioned the U.S. District Court departure from the usual course of judicial proceedings and other Federal Court decision, as to call for an exercise of this Court's power of supervision.

CONCLUSION 39

APPENDIX A

OPINION, United States Court

of Appeals for the Fifth Circuit,

No. 91-1926

TABLE OF AUTHORITIES

Page

Cases

BELL V HOOD 327 U.S. 678, 66, S.Ct. 773, 90, L.Ed. 939 (1946) 3, 14, 20, 31

BIVENS V. SIX UNKNOW NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS 403, U.S. 388, 91 S.Ct. 1999, 29 L. Ed. 2d 619 (1971) 3, 14, 20, 31

WILEY V. SINKER, 179, U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84 3, 14, 31

SWAFFORD V. TEMPLETON 185, U.S. 487, 491, 492, 22 S.Ct. 783, 784, 785, 46 L.Ed. 1005 3, 14, 31

OCEAN DRILLING & EXPLORATION CO. V. MONT BOAT RENTAL SERVICES INC., 799, F2d 213, 217, (5th Cir 1986) 13, 18

HAZEL ATLAS CO. V HARTFORD CO. 322 U.S. 238, 64, S.Ct. 997, 88 L.Ed. 250 29

Statutes

28 U.S.C. Section 1254(1) 5

42 U.S.C. § 2000 26

42 U.S.C. § 2000e-16(c) 5

Statutes

42 U.S.C. § 1981, § 1982, § 1983, § 1988 5

Constitutional Amendments Involved

5th Amendment to the United States Constitution 1, 2, 32, 33, 34, 35

6th Amendment to the United States Constitution 31, 32, 33, 34

7th Amendment to the United States Constitution 2, 35, 36

14th Amendment to the United States Constitution 3, 32, 33, 34, 35

Rules

Federal Rule of Civil Procedure Rule 41 5, 13, 15, 18, 18, 25, 28, 29

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

Robert Zamudio,

Petitioner,

versus

Samuel K. Skinner, Secretary,
Department of Transportation,

Respondent.

Petitioner, Robert Zamudio, respectfully prays that a Writ of Certiorari be issued to review the judgment and Opinion of the United States Court of Appeals for the Fifth Circuit filed March 12, 1992 and April 6, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth, Seventh and Fourteenth amendments to U.S. Constitution, (Const. Amend.).

The Fifth Const. Amend. provides:

"No person shall ... be deprived of life, liberty, or property, without due process.",

the Sixth Const. Amend. provides:

"In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witness against him; to have compulsory process for obtaining witness in his favor ...",

the Seventh Const. Amend. provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined in any Court of the United States that according to the rules of the common law.",

the Fourteenth Const. Amend. provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States ... shall any state deprive any person of life, liberty, or property

PRIOR DECISIONS OF THIS COURT INVOLVED

In both **BELL v. HOOD**, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), and **BIVENS v. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS**, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 619 (1971) this Court held that the Court's jurisdiction requirement is satisfied by allegation in complaint, even though not specific, which describes the deprivation of Constitutional rights.

In both **WILEY v. SINKER**, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84 and **SWAFFORD v. TEMPLETON**, 185 U.S. 487,

491, 492, 22 S. Ct. 783, 784, 785, 46 L.Ed. 1005 this Court held that recovery directly under the Constitution of the United States to show that the matter in controversy arose under the Constitution of the United States; the Court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

STATUTES INVOLVED

42 USC § 2000e-16, 42 USC § 1981, § 1982, § 1983, and § 1988.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVE

Rule 41

OPINIONS and ORDERS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit is contained in an unpublished document entitled Robert

Zamudio, Plaintiff-Appellant v. Samuel K. Skinner, Secretary, Department of Transportation, Defendant-Appellee dated March 12, 1992 No. 91-1926; and April 6, 1992 denial on petition for rehearing.

JURISDICTION OF THE SUPREME COURT

The Opinion of the Court of Appeals for the Fifth Circuit was entered on March 12, 1992 and filed a denial on petition for rehearing on April 6, 1992.

The United States Supreme Court jurisdiction is invoked either pursuant to 28 U.S.C. Section 1254(1) or the Fifth or Fourteenth Amendment to the United States Constitution, and/or 42 USC § 2000e-16, 42 USC § 1981, § 1982, § 1983, and § 1988.

This Petition for Writ of Certiorari is filed within 90 days of the entry on April 6, 1992 of the Court of Appeals denial on Petition for Rehearing.

STATEMENT OF THE CASE

Petitioner, Robert Zamudio, has been involved in various grievances, discrimination complaints, law suits, (defense complaints), with Respondent that resulted directly from the Petitioner's defense against the Respondent's overture action of prosecuting the Petitioner for a crime of defrauding the government that resulted in the Petitioner suffered loss or deprivation of property. Starting in 1987, as a defense against the Respondent's under taking of prosecuting the Petitioner for a crime of defrauding the government the Petitioner filed (defense complaints) protesting the validity and processing of the Respondent's actions. Through the rights of the Petitioner the defense complaints ended up in Federal Court.

Against the Petitioner's protests, the District Court never made a decision or addressed the issue of Court having jurisdictional power to investigate claim of deprivation of rights in first civil action, CA-6-89-0080, and at the same time the Court restricted the Petitioner's right of appealing a decision against the Court jurisdictional power to investigate new claims of deprivation of rights, because the new claims were never allowed by the Court to be part of first civil action's complaint.

The Court never addressed the issue of court having jurisdiction on a claim of deprivation of rights in first civil action, although the District Court did hold a Spears v. Mc Cotter hearing in first civil action, CA-6-89-0080. Every time the Petitioner attempted

to go into the merits of the case, (in order to show the Court had jurisdictional power in first civil action because of the fact Respondent and the Petitioner's Union had been involved in a conspiracy to further the overture action of the Respondent by depriving the Petitioner of his civil or Constitutional rights), the District Court would stop the Petitioner from addressing merits.

As an excerpt from the transcript of the proceedings of the August 7, 1990 hearing well show the Petitioner attempt to go into the merits of the case and the Court stopping Petitioner. Transcript page 58, line 23:

> "Ms. Koenig Your honor, I object, he is going into the merits of the case, and I think we're here to see if he states a claim and whether

our motion to dismiss should be granted and going into the merits at this time is premature.

The Court: I think that is probable right, ..."

Transcript page 60 line 13:

The Court: Mr. Zamudio, we're here on two grounds. The government had a motion to dismiss, and one of their grounds was that your civil action was untimely filed, so we're concerned with dates. You're talking to him now about the merits of your claim, whatever you have alleged about the merits of your claim, we take as true at this point. We're talking about these dates. If you want to ask Mr. Miller some questions about the dates of filings of various things, then that is what you need to ask him about. Do you understand

what I'm saying?"

The District Court never addressed or made a decision on the issue of "if the court had jurisdiction on the grounds of claims of deprivation of Petitioner's civil and/or U.S. Constitutional rights in prior or first civil action, CA-6-89-0080"; and yet when the Petitioner raised the same claims of civil or U.S. Constitutional right deprivation of Petitioner in a second civil action, CA-6-90-0083, the Court dismissed second civil action prior to the Court addressing or allowing the Petitioner same "DUE PROCESS" other Federal Courts have allowed in other civil actions with the same matter or similar claims of deprivation of civil and/or Constitutional rights being investigated by the Court prior to the court issuing a final decision.

The Court has unfairly deprived the Petitioner of his "DUE PROCESS" under the law in the matter the court handled the Petitioner's second civil action, CA-6-90-0083, because the Court has reneged on issuing a dismissal of first civil action, CA-6-89-0080, under Order/Judgment WITHOUT PREJUDICE FOR WANT OF JURISDICTION.

The District Court Decision

The District Court granted the Respondent's Motion to dismiss civil action, CA-6-90-0083, under the Doctrine of Res Judicata, (by applying the Fifth Circuit's "transactional" test), in conflict with (#1) other Courts decisions such as Supreme Court decisions the Petitioner cited; or (#2) when the Court in conflict with

Federal Rule of Civil Procedure 41, treated Petitioner's second civil action CA-6-90-0083, with prejudice, by the Court dismissing second civil action under the doctrine of Res Judicata prior to allowing the Petitioner the "DUE PROCESS" of a party about to have his civil action dismissed, (an opportunity to be heard) by the Court allowing a hearing and/or an opportunity to allow the Petitioner the due process of pretrial process such as discovery and interrogatives in support of civil action claims.

APPELLANT COURT

The Appellant Court treated second civil action, CA-6-90-0083, . with prejudice, by justifying the district court decision with a comparison of second civil action, CA-6-90-0083, whose prior civil action had been

dismissed without prejudice with a cited civil action, **OCEAN DRILLING, 799 F2d at 217**, whose prior civil action had been dismissed with prejudice. Rather than allowing civil action, CA-6-90-0083, the "DUE PROCESS" in accordance with Fed. Rule of Civil Procedure Rule 41, of Court without prejudice allowing a second civil action to be filed for relief on the same claim contained in a prior civil action, where prior civil action had been dismissed FOR WANT OF JURISDICTION.

The Petitioner argued second civil action had new claims with new issues of court jurisdiction that the district court had not rendered a decision on prior to dismissal of second civil action, CA-6-90-0083; that the district court decision was in conflict with

other court decisions on the same matter and that the Appellant Court was sanctioning the departure of the district court decision in conflict with such Supreme Court decisions as **BELL v. HOOD** 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); and in **BIVENS v. SIX UNKNOWN BUREAU OF NARCOTICS,** 403 U.S. 388, 91 S.Ct. 1999, 29 LEd.2d 619 (1971), which cases recognized the Federal Court's jurisdictional requirement is satisfied by allegations in the complaint, even though not specific, which describes the deprivation of Constitutional rights; and U.S. Supreme Court decisions such as **WILEY v. SINKER,** 179 U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84; and **SWAFFORD v. TEMPLETON** 185 U.S. 487, 491, 492, 22 S.Ct. 783, 784, 785, 46 L.Ed. 1005, which held that matter

in controversy arising under the Constitution of the United States, the Court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

The Petitioner argued the district court decision was in conflict with Rule 41 of Federal Rule of Civil Procedure and Doctrine of Res Judicata and unfairly deprived the Petitioner of "DUE PROCESS" by the Court dismissing civil action, CA-690-0083, under(1) the Court's assumption the Court would lack Court jurisdiction in second civil action, CA-6-90-0083, where new claims had been filed, and (2) the Court assumption a dismissal under the Doctrine of Res Judicata should apply

to civil action, CA-6-90-0083, because the Respondent never gave specific examples to show a dismissal under the doctrine of res judicata was warranted against civil action, CA-6-90-0083. The Petitioner argued that the district court's actions were a departure from the accepted and usual course of judicial proceedings.

The Court of Appeals' Decision

The U.S. Court of Appeals for the Fifth Circuit's rendered an unpublished decision or opinion contained in March 12, 1992 document entitled Robert Zamudio, Plaintiff-Appellant versus Samuel K. Skinner, Secretary, Department of Transportation, Defendant-Appellee, No. 91-1926, in future referred to as (Appellant Court's decision).

In the Appellant Court's decision dated March 12, 1992, under the first paragraph of page 4, the court stated:

> "... Rule 41 "means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action[;] [t]he judgment remains effective to preclude religitation of the precise issue of jurisdiction ... that led to the initial dismissal".[6] Because the jurisdictional deficiency in this case is not curable, we hold that the district Court's initial determination that it lacked jurisdiction over Zamudio's Title VII suit is a matter to which the bar of res judicata applies."

Thus indicating the Appellant Court unfairly deprived the Petitioner of

his due process of law, when the Court treated second civil action, CA-6-90-0083, with prejudice, by the Appellant Court justifying the district court decision with Fifth Circuit's "transactional" test and citing civil action, **OCEAN DRILLING, 799 F2d at 217**, whose prior civil action had been dismissed with prejudice, rather than allowing civil action, CA-6-90-0083, the "DUE PROCESS" in accordance with Fed. Rule of Civil Procedure Rule 41 by a Court not assuming a jurisdictional deficiency in prior civil action would also hold true in the second civil action and not allowing the Petitioner the due process of law other Courts have allowed other civil action of due process where a question of jurisdiction arises. In second civil action filed for relief on the same

claim filed in prior civil action, where the prior civil action had been dismissed FOR WANT OF JURISDICTION.

Petitioner **on petition for rehearing** dated March 17, 1992 on third page under 1st and 2nd paragraphs stated:

> "the court of appeals opinion dated March 12, 1992, statement the Jurisdictional deficiency in this case is not curable" is not a true statement when the Court considers or overlooked the Court's jurisdictional issue was corrected when the Petitioner invoked Court jurisdiction to determine controversy of Constitutional violation in which action was brought pursuant to U.S. Constitutional Amendment 14, which was lacking in prior civil action,

and again the Petitioner cited Supreme Court decisions previously cited stating

the Court of Appeals was overlooking cited cases that cured court jurisdictional lack in prior civil action.

Petitioner **on petition for rehearing** dated March 17, 1992 on 4th page under 1st paragraph the Petitioner stated:

the Appellant is cognizant of the fact that the claims before this court differs from those which were alleged in **BELL v. HOOD** and **BIVENS v. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS** but Federal Courts recognized the federal jurisdictional requirement is satisfied by allegations in the complaint, even though not specific, which describes the deprivation of constitutional rights.

Petitioner **on petition for rehearing** dated March 17, 1992 on 6th page under

1st and 3rd paragraph stated

the Court of appeals is looking at the same fact the lower court's Judgment of Dismissal was based on, and that was an assumption the court's jurisdictional deficiency was not curable. ... Thus religition of the precise issue of jurisdiction deficiency that let to the initial dismissal was not before the court. Also the newly discovered evidence the Appellant established in lower Court's February 10, 1992 hearing proved the lower court's jurisdictional deficiency in prior civil action, CA-6-89-0080 would have been curable or correctable in second civil action CA-6-90-0083.

(The Petitioner proved in a district court hearing on February 10, 1992 that there had been an act of fraud

committed in civil action CA-6-89-0080 that lead to civil action dismissal.)

The Appellant Court unfairly deprived the Petitioner of due process of law by the Appellant Court justifying the district court dismissal with the application of the Fifth Circuit's "transactional test, which does not recognize, either the conditions under which prior civil action had been dismissed, the U.S. Constitution, and/or the Laws, and/or Statutes of the United States, and/or the Federal Rule of Civil Procedure, and/or the fact the Petitioner claims now before the Court were not allowed in first civil action, CA-6-89-0080, only because the court did not address claim.

The Fifth Circuit Court of Appeals justified the district court decision being in conflict with other Courts,

and/or being so far a departure from the accepted and usual course of judicial proceedings and has also justified the Appellant Court sanctioning such a departure by the district court, with justification of the Fifth Circuit's "transactional" test, as was shown in Appellant Court decision dated March 12, 1992 under page 5 of 1st paragraph:

> "Zamudio next asserts that some of these claims are not barred under the doctrine of Res Judicata because he had not been able to amend his complaint to assert them. Under the Circuit's "transactional" test, a claim is res judicata if it asserts a transaction or wrong that has been, or could have been, asserted previously. In other words, it does not matter that Zamudio does not

allege in his second suit the specific claims that he alleged in his first; what matters is that he could have brought these legal theories because they arise from the same facts and circumstances."

The Petitioner responded on **Petition for rehearing** dated March 12, 1992

(1) that the Petitioner could not have asserted Petitioner's claims asserted in civil action, CA-6-90-0083, in prior or first civil action, CA-6-89-0080, because the Petitioner's complaints were never processed by Respondent and Petitioner only found out about some of the claims in civil action, CA-6-90-0083, through the courts power of discovery, only after the Petitioner had filed prior civil action, CA-6-89-0080;

(2) that the U.S. Court of Appeals by up holding of the district courts dismissal was sanctioning the district courts departure with the decision of other U.S. Court decisions on the same matter; and in conflict with Federal Rule of Civil Procedure, Rule 41.

The Appellant Court made a false statement in Appellant Court decision dated March 12, 1992 under the 6th page under the 1st paragraph that stated

"Zamudio did not exhaust administrative remedies before filing suit in Federal court--he brought this suit before he filed his grievance with the DOT and before he decided to appeal the DOT's rejection of his grievance to the EEOC,"

which was a false statement because the record showed as the Petitioner

pointed out **on petition for rehearing** dated March 17, 1992 under last paragraph of 10th page stated

> according to the Petitioner's calendar more than 180 days had elapsed from the filing of Appellant's formal complaint of discrimination on February 27, 1990 and the filing of Petitioner's second civil action, CA-6-90-0083 on August 30, 1990, without the Respondent having taken final action on Petitioner's complaint, thus giving the Court jurisdiction over Petitioner's second civil action CA-6-90- 0083, according 42 USC §2000e.

The Petitioner also argued prior civil action did not contain claims of civil or Constitutional right deprivation the Petitioner was entitled to use the power of the court to substantiate.

REASONS FOR GRANTING THE WRIT

A Federal District Court has rendered a decision in conflict with the decision of other U.S. Courts on the same matter, that the decision has so far departed from the accepted and usual course of judicial proceedings and the Fifth Circuit Court of Appeals has sanctioned the U.S. District Court departure from the usual course of judicial proceedings and other Federal Court decision, as to call for an exercise of this Court's power of supervision.

The Appellant Court justified dismissal of civil action, CA-6-90-0083, with Fifth Circuit's "transactional" test to apply a dismissal under the doctrine of Res Judicata. Where prior or first civil action dismissed under an Order/Judgment WITHOUT PREJUDICE

FOR WANT OF JURISDICTION was totally ignored. Second civil action, CA-6-90-0083 was suppose to be treated without prejudice according to the dismissal Order/Judgment issued in prior civil action, CA-6-89-0080 and Federal Rule of Civil Procedure 41. The federal Courts have justified depriving the Petitioner of his due process by applying a dismissal under the doctrine of Res Judicata, on a second civil action, prior to allowing the Petitioner the due process this Court stated this Petitioner was entitled to have: of the Court assume jurisdiction over the controversy to determine issues of fact, ~~by~~ THEN allowing the Petitioner to proceed beyond the threshold of Court to gather evidence in support of claims of deprivation of rights through the Court's power of

interrogatives, discovery, etc., or the due process afforded other civil actions where a question of court jurisdiction arises. The principles of Federal Rule of Civil Procedure, Rule 41, is clear on the subject and the court use of "transactional" test only served to unfairly deprive this Petitioner of his due process where there is a question of Court jurisdiction, and deprivation of civil, or U.S Constitutional rights.

The Petitioner stated second civil action, CA-6-90-0083, was an independent action to relieve the Petitioner for an act of fraud in prior civil action, CA-6-89-0080. This Court held in **Hazel Atlas Co. v. Hardford Co. 322 U.S. 238, 64. S.Ct. 997, 88 L.Ed. 250**, this Court set forth the principle of "fraud upon the Court" as an exception to

the doctrine of res judicata, which the Appellant Court ignored

The Appellant Court sanctioned the lower Court dismissing second civil action under the doctrine of Res Judicata, when both lower courts were aware the Petitioner had unsuccessfully attempted to include claims now being made in second civil action in prior civil action dismissed without prejudice. The lower Court have succeeded in depriving the Petitioner to appeal a claim of deprivation of rights by (1) the Court not addressing issue in prior case, (2) the court avoiding issue in second case by dismissing civil action under another issue, and (3) the court investigating Petitioner's claims and unfairly depriving the Petitioner of a hearing, discovery, etc., where other courts

have allowed other cases with similar claims.

Where no prior civil action on the same claim was dismissed with prejudice and no decision can be shown whether a court had jurisdiction to investigate Petitioner claims of Constitutional and/or civil rights, is Petitioner entitled to proceed beyond the threshold of the court and gather evidence in support of Petitioner's claims. This Court held in **Bell v. HOOD** 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; **Bivens v. Six Unknown Bureau of Narcotics,** 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619; **WILEY v. Sinker**, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 20, 45 L.Ed. 84; **Swafford v. Templeton** 185 U.S. 487, 491, 492, 22 S.Ct. 783, 784, 785, 46 L.Ed. 1005, this Court set forth the principle that in claims of

Constitution or civil rights deprivation the Federal Court would assume jurisdiction to investigate controversy prior to court issuing final decision.

Since the Petitioner's second civil action was Petitioner's defense against deprivation of property stemmed directly from Petitioner's defense and guaranteed under the Sixth Federal Constitution Amendment, (Const. Amend.), to the U.S. Constitution, because the Petitioner was being prosecuted for a crime of defrauding the government. By the District Court dismissing Civil action, CA-6-90-0083, prior to allowing the Petitioner the "DUE PROCESS" of law, and the Appellant Court up holding the district court's decision, the courts have deprived the Petitioner of the fundamental right of the accused contained in and guaranteed under either

the Fifth and/or the Fourteenth, (Const. Amend.) under the "DUE PROCESS" clause, which provides that no person shall be deprived of life, liberty, or property, without due process of law; and the Sixth, (Const. Amend.), which laid down constraints upon the national courts conduct, and essential to a fair trial, on which states no person shall be deprived in a criminal prosecution accused of a crime, the entitlement and the right under the Sixth Amendment to the U.S. Constitution

> ...the accused shall enjoy the rights ... to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor...

Petitioner was not allowed to confront witness against him nor to have compulsory process for obtaining witness

in support of civil action claims filed in defense of the Petitioner being deprived of property.

A history of our Constitution, a review of the cases interpreting our Constitutional, and basic principles of constitutional fairness should have been noted by the lower courts. The fundamental right of the accused contained in the Fifth Amendment to the U.S. Constitution under the forth clause is the Due Process Clause, which provides that no person shall be deprived of life, liberty, or property, without due process of law; ... and the Sixth Amendment to the U.S. Constitution laid down constraints upon the national courts conduct, and essential to a fair trial. This procedure is made obligatory against

the Federal government, (Courts), through the Fifth (Const. Amend.), a similar Due Process Clause is contained in the Fourteenth (Const. Amend.) with a further provision that no person shall be denied "the equal protection of the laws"; though there is no "equal protection" provision in the Fifth (Const. Amend.), the Supreme Court has held that the requirement is embraced within the Due Process Clause of the Fifth Amendment. The three main ~~pliers~~ PILLARS of this great county, (the President, the Congress, and the Courts) have passed laws up holding the basic rights guaranteed under the Constitution and the Courts have up held these laws.

One of the basic Constitutional rights is contained under the Seventh (Const. Amend.), which states in part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and on facts tried by a jury shall not be otherwise re-examined in any Court of the United States that according to the rules of the common law.

Where neither the Petitioner, the Respondent, nor the Court can show where (1) there was a prior dismissal with prejudice, (2) the Court addressed or made a decision on issues of Court jurisdiction lacking to investigate claims of deprivation of rights in a complaint in a prior suit, then the Seventh (Const. Amend.) clause;

> "... facts tried by a jury shall not be otherwise re-examined in any Court of the United States ..."

has not been violated, if so, then

the Fifth Circuit's "transactional" test is a white wash that is only service is to deprive this U.S. Citizen of his Constitutional rights by unfairly depriving a second civil action the due process of law other cited court decisions have allowed other civil actions where a claim of deprivation of rights was investigated prior to a Court's final decision. The Doctrine of Res Judicata already protects the accused from being held in double jeopardy, but the protection of the Doctrine of Res Judicata has been abused by the Court with the justification of the Fifth Circuit's "transactional" test to apply a dismissal under the doctrine of Res Judicata simply to avoid taking up the Court's time. The Fifth Circuit "transactional" test devolve excessive, unreasonable and

unlawful powers on the Courts resulting in violation of the due process of law, applicable Federal Rule of Civil Procedure, other Federal Court decision on the same matter, and guarantees under the U.S. Constitution. Many of the principles the Fifth Circuit's "transactional" test was set out to protect are already being protected by the U.S. Constitution, Federal Rule of Civil Procedure, and the Doctrine of res Judicata. The Petitioner requests this Court to exercise its original jurisdiction and issue a writ of mandamus compelling the Fifth Circuit Court of Appeals to modify its Opinion in Order so as to prevent irreparable harm to Petitioner and all others similarly situated.

And please no HOWEVER at this stage.

CONCLUSION

A review of the records and proceedings show every available opportunity the Petitioner filed some type of complaint and/or amendment. In First Civil Action a dismissal was issued because Court ruled Petitioner had not brought suit in a timely matter. The fact remains the Petitioner did attempt to amend first civil action complaint to include claim of deprivation of rights, which (1) was required of Respondent to be given to Petitioner, (2) rights withheld from Petitioner, (3) rights which caused Petitioner's first civil action to be dismissed for lack of jurisdiction. Petitioner's attempts to bring suit on claims of deprivation of rights in second civil action. Court dismisses second civil action because the court

states Petitioner should have raised claim in first civil action because second civil action stems from same facts in first civil action. Petitioner states part of Petitioner's claims is because Respondent deprived Petitioner of rights, including depriving Petitioner of information now before the Court and was not know to Petitioner prior to first civil action. The Court has unfairly deprived the Petitioner of DUE Process of civil action for something the Petitioner is complaining about to the Court, and a claim that was not included in first civil action only because the Court choose not to address new claim but not because Petitioner did not attempt to include new claim in first civil action.

An essential principle of due process

is that an individual, whose rights are about to be deprived is entitled to notice, an opportunity for a hearing, an opportunity to gather evidence in his behalf, etc.

Where a controversy involves the U.S. Constitution or a decision of the Supreme Court; all Federal Courts should abide and not allow different Circuits or courts to come up with personnel test to bypass the Supreme Court or U.S. Constitution. It would be a tragedy if the Fifth Circuit's Opinion and Fifth Circuit's "transactional" test were allowed to stand, for it radically alters the justice system. Wherefore, Petitioner requests this Court grant his Petition and that all lower court Orders/Judgments be reversed or dismissed without prejudice on matters in Petitioner's civil action.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1926

Robert Zamudio,

Plaintiff-Appellant

versue

Samuel K. Skinner, Secretary,
Department of Transportation,

Defendant-Appellee.

Appeal from the U.S. Districe Court
for the Northern District of Texas
(CA6-90-0083)

(March 12, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges.

Per Curiam*:

Plaintiff-Appellant Robert Zamudio

asks this court to find that the district court committed reversible error when it dismissed his first, second, fourth, fifth, sixth, and seventh claims under the doctrine of res judicata, and dismissed his third claim grounded in alleged discriminatory application of the Debt Collection Act,[1] for failure to exhaust administrative remedies. Finding no error, we affirm.

I. FACTS AND PROCEEDINGS

Zamudio, an air traffic control specialist with the Federal Aviation Adminstration (FAA), Department of Transportation (DOT), was suspended from his job for thirty days for submitting a false travel and subsistence voucher. For reasons that are not clear from the record, Zamudio was later transferred involuntarily

from San Antonio, Texas to San Angelo, Texas. In August 1987, the FAA commenced an administrative proceeding against Zamudio under the Debt Collection Act to recover the sums wrongly paid to him. Zamudio filed numerous grievances alleging that he was a victim of reprisal, and that the FAA's actions were motivated by discrimination based on race and national origin (Hispanic). Zamudio also claimed that the FAA violated the Debt Collection Act by making payroll deductions without providing due process. These grievance were denied.

Zamudio brought a discrimination suit pro se in federal court against the DOT under Title VII of the Civil Rights Act of 1964. The case was assigned to a magistrate judge. After a hearing to clarify the causes of

action, the magistrate judge found that Zamudio filed his complaint well after the thirty day limitation period in 42 USC § 2000e-16(c). The magistrate judge also recommended that Zamudio's claim under the Debt Collection Act be dismissed under Federal Rule of Civil Procedure 12(b)(6).

Adopting the magistrate judge's recommendations, in October 1990, the district court dismissed Zamudio's suit without prejudice for lack of jurisdiction.[2] Zamudio appealed. In June 1991, this court affirmed the district court's ruling in an unpublished per curiam option.

In August 1990, while this original suit was pending, Zamudio, again acting pro se, filed a second complaint alleging that his involuntary transfer and thirty day suspension violated

the Thirteenth and Fourteenth Amendments to the United States Constitution, the Equal Opportunity Act, 42 USC § 2000e-16, et seq, 29 CFR § 1613.214 et seq, and Comptroller General Decision No. B-214152.[3] Zamudio brought yet another claim under the Debt Collection Act. In June 1991, the district court dismissed Zamudio's first, second, forth, fifth, sixth, and seventh claims under the doctrine of res judicata, finding those claims duplicative of the Title VII claim alleged in the first suit. The district court also dismissed Zamudio's third claim under the Debt Collection Act on the ground that he failed to exhaust administrative remedies before filing his complaint in federal court.

II. ANALYSIS

A. RES JUDICATA

Zamudio contends that the district court erred in finding the first, second, fourth, fifth, sixth, and seventh claims in his second complaint barred under the doctrine of res judicata because his first complaint was dismissed for want of jurisdiction. Under Federal Rule of Civil Procedure 41 (Rule 41), dismissal for want of jurisdiction is not dismissal on the merits. Thus, argues Zamudio, dismissal for lack of jurisdiction by definition cannot meet this circuit's test for res judicata, which requires a "final judgment on the merits".[4] What Zamudio overlooks, however, is that "[d]ismissal for lack of jurisdiction may be given res judicata effect as to the jurisdictional issue."[5] Rule 41 "means only that the dismissal permits a second action on the same claim that corrects

the deficiency found in the first action[;] [t]he judgment remains effective to preclude religitation of the precise issue of jurisdiction ... that led to the initial dismissal."[6] Because the jurisdictional deficiency in this case is not curable, we hold that the district Court's initial determination that it lacked jurisdiction over Zamudio's Title VII suit is a matter to which the bar of res judicata applies.

Zamudio next asserts that some of these claims are not barred under the doctrine of res judicata because he had not been able to amend his complaint to assert them. Under this circuit's "transactional" test, a claim is res judicata if it asserts a transaction or wrong that has been, or could have been, asserted previously.[7] In other

words, it does not matter that Zamudio does not allege in his second suit the specific claims that he alleged in his first; what matters is that he could have brought these legal theories because they arise from the same facts and circumstances.[8]

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Zamudio challeges the distric court's dismissal--for the second time--of his claim asserting discriminatroy application of the Debt Collection Act. The district court found that it had no jurisdiction over this claim under 42 USC § 2000e-16(c) because Zamudio did not exhaust his administrative remedies before filing suit.

Zamudio contacted the EEOC on February 2, 1990, alleging that the FAA failed to inform him before making

payroll deductions, that he was not given an opportunity to request administrative review, and that he did not receive delinquency notices advising him of his rights. On February 27, 1990, Zamudio filed a grievance with the DOT concerning its actions under the Debt Collection Act. The DOT denied this grievance on September 20, 1990. At that point, Zamudio, was informed that he could either appeal to the EEOC or file suit in federal district court. Zamudio elected to appeal to the EEOC, and filed his complaint on September 30, 1990. On February 1, 1991, the EEOC vacated the DOT's decision and remanded the case for further investigation. The EEOC's action was not a final decision on Zamudios complaint, however.[9] As such, Zamudio may file suit in federal

court either (1) within thirty calendar days following receipt of the notice of DOT's final action on his complaint of DOT's final action on his complaint after it is remanded by the EEOC, or (2) one hundred and eighty calendar days following the date on which he filed his appeal with the EEOC if there has been no final action by the EEOC during that period, even if an administrative action is pending.[10]

But Zamudio filed his suit in federal court on August 30, 1990, and amended it on December 6, 1990. Obviously, Zamudio did not exhaust administrative remedies before filing suit in federal court--he brought this suit before he filed his grievance with DOT and before he decided to appeal the DOT's rejection of his grievance to the EEOC. Therefore, we affirm the judgment of

the district Court dismissing Zamudio's Debt Collection Act claim for lack of jurisdiction given his failure to exhaust administrative remedies.

Lastly, we have reviewed Zamudio's charge that the district court should not have dismissed his suit without additional fact-finding and conclude that this charge too is without merit.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1926

Robert Zamudio,
Plaintiff-Appellant

versue

Samuel K. Skinner, Secretary,
Department of Transportation,
Defendant-Appellee.

Appeal from the U.S. Districe Court
for the Northern District of Texa

ON PETITION FOR REHEARING

(April 6, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges.
Per Curiam :

It is ORDERED that the petitioner for ~~regearing~~ REHEARING filed in the above entitled and numbered cause be and the same hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

PETITIONER FOR WRIT OF CERTIORARI

Submitted Respectfully,

Robert Zamudio June 22, 1992.

Robert Zamudio, Petitioner

CERTIFICATE OF SERVICE

I, Robert Zamudio, do hereby certify that a true and correct copy of the enclosed foregoing documents was served by CERTIFIED MAIL to:

Mr. Marvin Collins, U.S. Department of Justice, U.S. Attorney Northern District of Texas and Nancy Koenig Assistant U.S. Attorney Northern District Texas 1205 Texas Avenue, Room C-201 Lubbock, Texas 79401 (CERTIFIED MAIL P 440 518 638)

Mr. Card, Secretary, Deptartment of Transportation, 400 7th Street, S.W. Washington, D.C. 20590 (CERTIFIED MAIL P 440 518 639)

Mr. Barr, Attorney General of the United States, Main Justice Bldg. 10th & Constitution AVE. Washington,D.C. 20530 (Certified Mail P 695 851 001)

Mr, Kenneth W. Starr, Solicitor General, Department of Justice Washington, D.C. 20530 (CERTIFIED MAIL P 440 518 640)

Robert Zamudio 06-22-92

Robert Zamudio, Petitioner (06-22-'92)

(Last Page)